No. 12867

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent,

BRIEF OF INTERVENING RESPONDENT BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

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INDEX

Table of Authorities Cited

Statutes

Miscellaneous

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BASIS OF JURISDICTION

1. Jurisdiction of Civil Aeronautics Board.

The jurisdiction of the Civil Aeronautics Board, in the proceeding now before this Court for review, was predicated upon Sections 401, 408, and 412 of the Civil Aeronautics Act, as amended (49 U.S.C., Section 481, 488 and 492; 52 Stat. 987, 1001, and 1004), requiring approval of the Civil Aeronautics Board with respect to certain specified activities and transactions in connection with air transportation, including the issuance and transfer of certificates of authority to engage in air transportation (Sec. 401 (i)), the consolidation or merger, or purchase, of air carrier properties (Sec. 408 (a) and (b)), and certain specified contracts or agreements between air carriers (Sec.

412 (a) and (b)). In this case the petitioner herein, Western Air Lines, Inc., and United Air Lines, Inc., joined in seeking the Board's approval, under the foregoing provisions, of a transaction whereby, pursuant to a written contract between them, Western's certificate of authority to engage in air transportation over its Route 68, between Los Angeles and Denver, would be sold and transferred to United, together with certain related physical properties.

2. Jurisdiction of this Court.

The petitioner predicates jurisdiction of this Court upon Section 1006 of the Civil Aeronautics Act (49 U.S.C., Sec. 646, 52 Stat. 1024) and Section 10 of the Administrative Procedure Act (5 U.S.C., Sec. 1009, 60 Stat. 243). Section 1006 of the Civil Aeronautics Act prescribes a complete procedure for review of the orders of the Civil Aeronautics Board. Section 10 of the Administrative Procedure Act provides that "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute . . .", except in cases of ". . . the absence or inadequacy thereof . . ." It is not contended by the petitioner that the "special statutory review proceeding" prescribed by Section 1006 of the Civil Aeronautics Act is inadequate.

STATEMENT OF THE CASE

With a few exceptions, the Statement of the Case contained at pages 2-8 of the petitioner's brief constitutes a fairly complete and accurate summary of the proceedings before the Board. The exceptions to which we have reference relate mainly to petitioner's chronology of the events of the case. That chronology should be supplemented as follows:

August 25, 1947. The Board's original order noted at page 4 of petitioner's brief, omitted any conditions for the protection of employees, the Board indicating in its opinion accompanying the order that this omission was being made in the light of testimony by Western's president that no employees would be adversely affected by the route transfer. (R. 97-98.)

September 29, 1947. In answering the petitions of the Air Line Pilots Association and the Airline Mechanics Division, U.A.W.-C.I.O., for reconsideration of the Board's original order, Public Counsel recommended that before passing upon these petitions the Board should "request the parties—Western, United, A.L.P.A., the Brotherhood, U.A.W., and any other representatives of the employees—to endeavor to work out for presentation to the Board and incorporation in an amended order an arrangement for the protection of Western's displaced employees", and that failing such a voluntary agreement, the Board should then "order a further hearing on the subject of what conditions, if any, should be imposed for the protection of such displaced employees." (R. 228.)

December 5, 1947. In a conference attended by all of the interested parties, the Board recommended that the parties attempt to agree upon a satisfactory arrangement for the protection of employees of Western who were adversely affected by the transfer of Route 68 to United. (R. 246.)

In accordance with this recommendation, the parties subsequently held several conferences; but on each such occasion Western refused to give serious consideration to the development of a fair and equitable basis or formula

for employee protection, and instead continued to maintain that no employees would be adversely affected, and to demand proof of the precise incidence and extent of adverse effect of the transaction upon each and every employee, as a prerequisite to discussion of the type of employee protection to be afforded. (R. 683, 709.) Finally, the parties advised the Board of the failure of efforts to work out any voluntary agreement (R. 246-247), and the Board's order of August 25, 1948, reopening the proceedings on the question of employee protection, ensued.

As supplemented by the items to which we have directed attention, petitioner's Statement of the Case sufficiently points up the issues argued in the brief filed by the petitioner. The Statement is, however, silent as to the particular conditions for employee protection which were embodied in the Board's opinion and Order Number E-4444, dated July 7, 1950, (R. 815-847), as modified by the clarifying Order No. E-4987, dated December 29, 1950, (R. 861-872). Nor is there any reference to the evidence upon which the Board concluded that conditions for the protection of employees who might be adversely affected by the transaction between Western and United were necessary and desirable and should be imposed in this case.

Such information, relating to what might loosely be termed "the merits of the case", does not of course bear directly upon any of the points argued in Western's brief, as enumerated at pages 8 and 9 under the headings "Questions Involved" and "Specification of Errors". For this reason, we will not burden the Court with any lengthy review of the evidence adduced in the proceedings before the Board. Some reference will, however, be made to these matters in the course of our argument herein, for the rea-

son that neither petitioner's brief[1] nor its Statement of Points, etc., filed with the Petition for Review herein (R. 883) indicates a complete abandonment of this point.

QUESTIONS INVOLVED

Although five separate questions are stated and argued in petitioner's brief, it seems to us that there are only three major questions involved in this appeal, and that the additional points urged by Western are subordinate to one or another of these three basic issues. Thus the principal questions involved, and the subordinate issues, including those raised by the petitioner, are as follows:

I. Does the Civil Aeronautics Board possess the authority to impose, as conditions of its approval of transactions of the sort here involved, requirements for the protection of employees who may be adversely affected by such transactions?

II. Were the conditions imposed in this case for the protection of employees fair and reasonable, and justified by the facts of this case?

A. Was this an appropriate case for the imposition of protective conditions for employees?

B. Were the particular conditions imposed fair and reasonable?

1. The arbitration features of the conditions.

2. Failure to require United to contribute to cost of protecting Western's employees.

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[1]The following statement appears at page 30 of petitioner's brief:

"The record in the reopened proceeding would support, if, in fact, it did not compel, a finding that the employees of Western were not adversely affected by the transfer of the route, but since the force of the other points urged by Western make it unnecessary to impose upon this Court the burden of weighing the evidence that point will not be urged *in this opening brief*."

III. Did the Board act properly in the procedural or formal aspects of the proceedings below?

A. Reopening and reconsideration of the case with respect to the question of employee protection.

B. Delay in processing after reopening.

SUMMARY OF ARGUMENT

I. THE BOARD POSSESSED AUTHORITY TO IMPOSE CONDITIONS FOR THE PROTECTION OF EMPLOYEES.

Under Sections 401 (i), 408 (b) and 412 (b) of the Civil Aeronautics Act, transactions of the sort here involved may be approved only if the Board finds them to be "consistent with the public interest", and the Board is expressly authorized to grant its approval "upon such terms and conditions as it shall find to be just and reasonable". The Board's statutory authority thus is phrased in language almost identical with that which the Supreme Court has construed as authorizing the imposition, by the Interstate Commerce Commission, of conditions for the protection of railroad employees in connection with similar transactions between rail carriers. In so holding, the Court recognized a direct relationship between the welfare and morale of employees and the public interest which Congress had sought to protect. The same considerations of public interest in the maintenance of an efficient and uninterrupted system of transportation are present in the railroad and airline industries. Labor relations in both industries have been subjected by Congress to the same statute, the Railway Labor Act. And employee welfare and morale is of equal or greater importance to the safety and efficiency of air transportation, and is fully as apt to be affected by job displacement as is the welfare and morale of railroad employees.

II. THE EMPLOYEE PROTECTIVE CONDITIONS IMPOSED BY THE BOARD WERE FAIR AND REASONABLE, AND JUSTIFIED BY THE FACTS OF THIS CASE.

A. This was an appropriate case for the imposition of employee protective conditions.

Western has refrained from presenting any argument on this point, although it still maintains that its employees were not adversely affected by the transaction involved. Actually the evidence presented to the Board, and the testimony of Western's own witnesses, establishes beyond question that numerous employees of Western were adversely affected. Western throughout these proceedings appears to have labored under the misapprehension that the need for protective conditions can be obviated by readjustment of the employment situation of persons immediately displaced by the route transfer, irrespective of the impact of that readjustment upon other employees; and that such transposition of the adverse effect from one group of employees to another constitutes *absence* of adverse effect. The financial benefits of the transaction in question were enjoyed by Western to the detriment of the employees ultimately displaced as a result thereof.

B. The protective conditions imposed by the Board were fair and reasonable insofar as Western is concerned.

The conditions imposed are less favorable to the employees, and impose less of a burden upon Western, than conditions imposed in numerous similar transactions over a period of years by the Interstate Commerce Commission, and which have been upheld by the Supreme Court. They are less favorable to the employees, and less burdensome to Western, than similar conditions recognized as fair and reasonable by mutual agreement (the Washington Agreement of 1936) between representatives of management and

labor on most of the major railroads in the United States. Consideration of the details of the conditions prescribed by the Board reveals the extremely limited and partial nature of the compensation afforded to employees for the detriment suffered by them in order that Western might enjoy the financial benefits of the transaction in question.

1. Arbitration features of the conditions.

The Board did not delegate to arbitrators its function of fixing the conditions for the protection of employees, or determining whether the conditions imposed were fair and reasonable. The Board itself prescribed a complete formula for the protection of employees, leaving to the parties, or to arbitrators only in the event of disagreement by the parties, the purely ministerial function of applying that formula to the situation developing as a result of the route transfer. All discretion in the matter was retained by the Board. In its final order the Board retained jurisdiction of the proceeding for purposes broad enough to include the review of findings by the arbitrators. Any action or inaction by the Board on a request to review the arbitrators' findings would be as much subject to review by this Court as any other order of the Board.

2. Failure to require United to contribute to cost of protecting Western's employees.

On the facts of the instant case, it is of little moment to the employees on whose behalf this brief is filed whether Western, United, or both, bear whatever cost may be involved in the application of the protective conditions imposed by the Board. In the exercise of its discretion, the Board determined that in this case it was not unjust or unreasonable to require Western to bear this cost. While we believe there is nothing in the facts of this case to support the contention that the Board abused its discretion in this

particular, argument on this point, involving a fairly detailed review of the factual situation herein, will be left to the parties directly interested.

III. THE BOARD'S CONDUCT OF THE PROCEEDINGS BELOW WAS PROPER AND LAWFUL.

A. Reopening and reconsideraton of the case with respect to the question of employee protection.

The case was reopened by the Board, on the question of employee protection, upon petitions for reconsideration duly filed in accordance with the published rules and regulations of the Board. The Board's original order approved the consummation of the route transfer on a date prior to the expiration of the prescribed time for seeking reconsideration solely as a matter of convenience and economy to Western, in the light of the provisions of its contract with United. If Western proceeded on the assumption that reconsideration of employee protection would not be sought, or if sought would be denied by the Board, it did so at its own peril.

Omission of conditions for the protection of employees from the Board's original order was the direct result of Western's representations to the Board as to the absence of adverse effect upon employees. Western's actions between the date of the original order, and the expiration of the period within which reconsideration might be sought under the Board's rules, belied its previous representations to the Board, and constituted new evidence of adverse effect which alone would have supported reconsideration.

Within 10 days from the date of consummation of the route transfer, Western knew that the question of employee protection was again before the Board, but neither then nor subsequently did it ask the Board to restore the status quo pending determination of this question.

In effect, Western is contending that by accelerating the date for putting its orders into effect, the Board could in every case foreclose parties wishing to challenge the orders from seeking reconsideration or pursuing their rights of appeal. Such a contention is clearly untenable.

B. Delay in processing after reopening.

At no time did Western interpose any objections to delay in the reopened proceedings before the Board. Had it wished to accelerate those proceedings, and had the Board on request refused to do so, ample remedies would have been available to Western under the Administrative Procedure Act to which it has referred so extensively in its brief. Section 1006 of the Civil Aeronautics Act, under which this review proceeding is brought, prohibits consideration of objections not urged before the Board.

It has never, to our knowledge, been held that delay in the conduct of a proceeding could wipe out the substantive rights of the parties. But Western is here asserting delay on the part of the Board as a means of denying its employees the benefit of the protective conditions imposed. The only remedy for such delay is one which Western refrained from pursuing, i.e., an action in the nature of mandamus against the Board, such as the action expressly authorized by Section 10 (e) of the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed".

ARGUMENT

I. THE BOARD POSSESSED AUTHORITY TO IMPOSE CONDITIONS FOR THE PROECTION OF EMPLOYEES.

The sections of the Civil Aeronautics Act under which Western and United sought Board approval of the sale and transfer of the former's Route 68, contain the following provisions which are material to this portion of our discussion:

Sec. 401 (49 U.S.C., Sec. 481).

"(i) No certificate may be transferred unless such transfer is approved by the Board as being *consistent with the public interest.*" (Emphasis supplied.)

Sec. 408 (49 U.S.C., Sec. 488).

"(b) . . . Unless . . . the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be *consistent with the public interest* or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, *upon such terms and conditions as it shall find to be just and reasonable* and with such modifications as it may prescribe. . . ." (Emphasis supplied.)

Sec. 412 (49 U.S.C., Sec. 492).

"(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be *adverse to the public interest,* or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be *adverse to the public interest,* or in violation of this Act. . . ." (Emphasis supplied.)

It is clear from the foregoing that the Board was authorized to incorporate in any order approving the transaction here involved, such terms and conditions as it found

to be just and reasonable and in the public interest. This gives rise to the question of whether adverse effect which may result to employees because of such a transaction should be considered by the Board as a part of the public interest which it is required to protect.

This question was thoroughly explored in the railroad industry in the interpretation of a substantially identical provision of the Interstate Commerce Act. Section 5 (4) (b) of that Act, as it was phrased prior to amendment by the Transportation Act of 1940,[2] provided in part as follows:

> "If . . . the Commission finds that subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."

It will be noted from the foregoing language that the Interstate Commerce Commission, like the Board, was empowered in its orders approving consolidations, mergers, operating contracts, or other acquisitions of control, to impose such terms and conditions as it found to be just and reasonable in the public interest. Thus the Commission had

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[2]Reference is made to the Interstate Commerce Act provision as it existed prior to the amendments of 1940 for the reason that after 1940 the statute imposed a mandatory duty upon the Commission to protect employees adversely affected by unification transactions, whereas such protection was discretionary prior to 1940, as it is today under the Civil Aeronautics Act.

Similarly, in 1943 Congress added mandatory provisions to the Federal Communications Act for the protection of employees of telegraph carriers adversely affected by consolidation transactions, 47 U.S.C. Sec. 222 (f).

before it prior to 1940 the identical question presented here, i.e., is employee protection a part of the public interest which should be protected by just and reasonable conditions?

There can be little doubt that it was the intention of Congress to confer upon this Board, insofar as Section 408 proceedings are concerned, the same authority in the field of air transportation as had been granted to the Interstate Commerce Commission in the railroad industry under Section 5 of the Interstate Commerce Act. Not only was the language of Section 408 (b) of the Civil Aeronautics Act modeled from the language of Section 5 (4) (b) of the Interstate Commerce Act, but when the measure was before Congress, Senator Truman observed:

> "Insofar as consolidations are concerned they are left to the Authority which would have a power similar to that exercised by the Interstate Commerce Commission in connection with the consolidation of railroads."[3]

Accordingly, the established interpretation of Section 5 (4) (b) of the Interstate Commerce Act on the question of employee protection should be given considerable weight by the Court in determining Congressional policy under Section 408 (b) of the Civil Aeronautics Act. Proper construction of Section 5 (4) (b) of the Interstate Commerce Act was established by the Supreme Court of the United States in *United States v. Lowden,* 308 U.S. 225. That case involved the consolidation of two railroad properties by the lease of one of the properties to the company operating the other. The Interstate Commerce Commission imposed comprehensive conditions for employee protection, and in upholding the Commission's right to impose such conditions, the Court said:

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[3]83 Cong. Rec. 6728.

"The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored. . ." (pp. 235-236.)

". . . we do not doubt that Congress, by its choice of the broad language of Sec. 5 (4) (b) intended at least to permit the Commission, in authorizing railroad consolidations and leases, to impose upon carriers conditions related, as these are, to the public policy of the Transportation Act to facilitate railroad consolidation, and to promote the adequacy and efficiency of the railroad transportation system." (p. 238.)

"If we are right in our conclusion that the statute is a permissible regulation of interstate commerce, the exercise of that power to foster, protect and control the commerce with proper regard for the welfare of those who are immediately concerned in it, as well as the public at large, is undoubted. . . . Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier dutes, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege. That was determined in Dayton-Goose Creek R. Co. v. United States, 263 U.S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A.L.R. 472, supra. There it was held that the Fifth Amendment does not forbid the compulsory application of income, attributable to a privilege enjoyed by a railroad as a result of Commission action, to specified purposes 'in furtherance of the public interest in railway transportation.' Section 422 (10), Transportation Act, 41 Stat. at L. 490, chap. 91, 49 U.S.C.A. Sec. 15a. Moreover we cannot say that this limited and special application of the principle, fully recognized

in our cases sustaining workmen's compensation acts, that a business may be required to carry the burden of employee wastage incident to its operation, infringes due process. . . ." (p. 240.)

The fact that protection of employees in consolidation and acquisition cases under the Interstate Commerce Act was made mandatory by Congress in the Transportation Act of 1940[4] does not detract from the applicability of its practice and policy on employee protection where the power to impose such conditions is discretionary. As the Supreme Court observed in the *Lowden* case in noting the pendency of proposed legislation not then enacted which finally resulted in the mandatory provision for employee protection above cited (308 U.S. at 239):

> "The fact that a bill has recently been introduced in Congress and approved by both houses, requiring as a matter of national railway transportation policy the protection of employees such as the Commission has given here, does not militate against this conclusion. Doubts which the Commission at one time entertained, but later resolved in favor of its authority to impose the conditions, were followed by the recommendation of the Committee of Six that fair and equitable arrangements for the protection of employees be

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[4]Section 5 (2) (f) of the Interstate Commerce Act, 49 U.S.C. Sec. 5 (2) (f) provides:

"As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

> 'required'. It was this recommendation which was embodied in the new legislation. Sen. Rep. No. 433, 76th Cong. 1st Sess., p. 29. *We think the only effect of this action was to give legislative emphasis to a policy and a practice already recognized by Sec.* 5 (4) (*b*) *by making the practice mandatory instead of discretionary, as it had been under the earlier act.*" (Emphasis supplied.)

Moreover, in abandonment cases under the Interstate Commerce Act where protective conditions for employees are not mandatory, the Commission regularly provides the same type of protection today as it affords under the merger and consolidation section of the Act. In this connection, it is interesting to note that while the Commission concluded that terms and conditions for the protection of employees were within its discretionary powers in consolidation proceedings under Section 5 (4) (b), it originally concluded that it did not have such authority in abandonment cases under Section 1 (20) of the Interstate Commerce Act (49 U.S.C., Sec. 1 (20)). In reaching this conclusion, the Commission reasoned that the conditions which it was authorized to impose under the consolidation section—"just and reasonable" conditions which "will promote the public interest"—were of much broader scope than the conditions it is authorized to impose under the abandonment section—conditions which "the public convenience and necessity may require". The Supreme Court of the United States reversed the Commission in this construction of the statute, and found that it did possess the authority to protect employees adversely affected by abandonments, in *Interstate Commerce Commission v. Railway Labor Executives' Association,* 315 U.S. 373. In doing so the Court observed (p. 377):

> "And if national interests are to be considered in connection with an abandonment, there is nothing in the Act to indicate that the national interest in purely

financial stability is to be determinative while the national interest in the stability of the labor supply available to the railroads is to be disregarded. On the contrary, the *Lowden Case* recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system. Such possible unstabilizing effects on the national railroad system are no smaller in the case of an abandonment like the one before us than in a consolidation case like that involved in the *Lowden Case*. Hence, it is only by excluding considerations of national policy with respect to the transportation system from the scope of 'public convenience and necessity', an exclusion inconsistent with the Act as this Court has interpreted it, that the distinction made by the Commission can be maintained."

The foregoing considerations require the conclusion that under the Civil Aeronautics Act, the Board has the same power to impose terms and conditions for the protection of employees as that exercised by the Interstate Commerce Commission and sustained by the Supreme Court in the *Lowden* and *Railway Labor Executives' Association* cases. The authority of the Board and the Commission is prescribed in almost identical statutory language; the same considerations of national interest in the stability and efficient operation of transportation are equally present in the rail and air industries; Congress has found it desirable to place both rail and air transportation under the Railway Labor Act and thus regards them, apart from other modes of transportation, as coordinate in terms of labor-management relations; and finally, it goes without saying that employee welfare and morale is of equal or greater importance to the safety and efficiency of air transportation, and fully as apt to be affected by job displacement, as is the welfare and morale of railroad employees.

Petitioner has advanced no argument why the reason-

ing of the Supreme Court's holdings with respect to the power of the Interstate Commerce Commission is not equally applicable to the question of the authority of the Civil Aeronautics Board in this case, except to attempt to differentiate Congressional intent with respect to the two industries on the ground that general economic conditions confronting the railroads during the depression were different from those prevailing in the airline industry today. This argument of course ignores the facts that the Commission's authority to grant employee protection in transactions of this sort not only did not end with the depression, but has been regularly exercised to this day; that in enacting the Transportation Act of 1940, Congress not only did not diminish the Commission's authority, but added affirmitive guarantees of employee protection (49 U.S.C., Sec. 5 (2) (f)); and that the need and desirability of preserving employee welfare and morale by granting some measure of protection in such cases is no more transitory than is the public interest in the maintenance of an adequate, safe and efficient transportation service.

It is of course true that in the early 1930's, the impact of railroad consolidations upon employees in depression times was so severe as to call for more stringent legislative measures than would be required on a permanent basis. Indeed, such legislation was forthcoming, in the form of the Emergency Transportation Act of 1933 (48 Stat. 211). But it was not this temporary legislation, but rather the permanent statutory provisions, which the Supreme Court in the *Lowden* and *Railway Labor Executives' Association* cases found to support the power to grant employee protection. Thus, as the Court said in the more recent case of *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950), in reviewing the legislative history of the Commission's authority to grant employee protection:

> ". . . In the Emergency Transportation Act of 1933, 48 Stat. 211, Ch. 91, there were many temporary

provisions which originally were to expire in 1934 and finally did expire in 1936. Among these was Section 7 (b). It provided that no employee was to be deprived of employment or be in a worse position with respect to his job by reason of any action taken pursuant to the authority conferred by the Act. *That provision, on a temporary and independent basis, thus coexisted with the permanent amendments which were then made to Section 5 of the Interstate Commerce Act,* including Section 5 (4) (b)." (339 U.S. 15, footnote 13; emphasis supplied.)

And finally, we are at a complete loss to see the logic of Western's contention that the burden of protective conditions should not be placed upon the airlines, which Western describes as being so thriving and having such a bright future, while such burden should be placed upon the railroads which are described as "brinking on insipient [sic] deterioration". Surely the loss of his job is as serious to an employee in one industry as in the other; and if either industry were to be exempted from alleviating such hardship of its employees, certainly the one least able, not best able, to pay should be exempted.

II. THE EMPLOYEE PROTECTIVE CONDITIONS IMPOSED BY THE BOARD WERE FAIR AND REASONABLE, AND JUSTIFIED BY THE FACTS OF THIS CASE.

A. This was an appropriate case for the imposition of employee protective conditions.

Throughout the Board proceedings, Western's position on this point was that protective conditions should not be imposed for the reason that none of its employees would be adversely affected by the route transfer. In its brief filed with this Court, Western has failed to present any argument along these lines. But as we have pointed out, it still does not appear to have abandoned its former con-

tention; and for that reason we feel that some brief reference should be made to the facts clearly establishing the adverse effect of this transaction upon Western's employees.

In the proceedings before the Board, no attempt was made to demonstrate the precise incidence and extent, in monetary terms, of the effect of the route transfer upon Western's employees. The record is, however, replete with evidence of substantial adverse effect of this transaction upon numerous employees, justifying the application of a formula for employee protection such as that embodied in the Board's final order.

We have pointed out that Western, though not arguing the point, still maintains that no employees were adversely affected. Because this position of Western seems to be based not on any attempt to refute the evidence of adverse effect here, but rather on a basic misapprehension as to what constitutes adverse effect for which employees should, in the public interest, be compensated, we shall not undertake any lengthy process of reviewing the evidence. We shall instead refer briefly to portions of the record clearly establishing that employees were adversely affected, and will then discuss what appears to us to be the basic fallacy in Western's approach to the question.

Lengthy testimony on this question appears in the record, numerous witnesses having testified for both the labor organizations and for Western; but the exhibits introduced by the Air Line Pilots Association (R. 771-796) and the Brotherhood (R. 797-805) amply demonstrate that numerous pilots and ground personnel were furloughed or dismissed as a direct result of the route transfer, and that most of these employees not only incurred out of pocket expenses in effecting readjustment of their employment situation, but were unable to obtain other positions, with West-

ern or elsewhere, in which their compensation equalled what they would have earned had the route transfer not occurred.

But to truly appreciate the impact of this transaction upon Western's employees, it is necessary to look beyond the group formerly employed on Route 68. Under the seniority systems in effect among Western's employees, individuals directly displaced as a result of the termination of the Route 68 operations in turn displaced other employees at widely scattered points on Western's system, thus setting up a chain reaction resulting in the ultimate loss of jobs by employees who had never worked on the Route 68 operations at all. Such employees are the real beneficiaries of a protective formula such as that imposed by the Board; and the fact that they were displaced indirectly instead of directly does not make the adverse effect upon them any the less the result of the transaction here involved, or obliterate the public interest requiring their protection as displaced employees.

Western's basic misapprehension throughout appears to have been that the only employees with whom the Board should concern itself were those directly employed on Route 68, and immediately displaced by the cessation of operations over that route. Since many of those employees were able to obtain other positions through exercise of their seniority rights, Western argued that the transaction involved no adverse effect upon employees.

It is of course conceivable that a company engaged in an over-all program of expansion could terminate one aspect of its operations and still absorb all of the displaced employees without having to discharge anyone else. But this was not Western's situation. Rather, it appears that at the time of the route transfer, and at all times since, Western has been engaged in an overall program of *reduc-*

ing its personnel. This is well illustrated by the testimony of Mr. Arthur F. Kelly, Western's Vice President of Traffic and former Executive Assistant to its President, appearing at pages 682-683 of the Record. In discussing this general reduction of personnel, Mr. Kelly said:

> "It can be further added that the cutback started when Mr. Drinkwater came with Western Airlines beginning January 1, 1947, and it is continuing."

Indeed, this one fact alone, coupled with the fact that the transaction in this case involved a complete cessation of Western's operations over an 878 mile air route between two major traffic centers, the sale of the equipment used to operate the route, and the termination of the positions of employees engaged in the discontinued operation, is all that is needed to conclusively establish adverse effect upon employees, leaving only the questions of the identity of the employees ultimately affected and the amount of their financial loss.

Western's attitude on this whole question, to the effect that if the employees who had been working on Route 68 could get other jobs on the system by exercising their seniority rights, no adverse effect was involved, is illustrated by the following testimony of Mr. Kelly:

> "*We acknowledge the fact that people were affected by the sale of Route* 68. The question at issue is whether these people were adversely affected. In transposing people from other route sections they would be affected. How they were adversely affected, is a question. In the case of ground personnel, *we did everything we could to see that they were able to exercise their seniority right.*" (R. 699; emphasis supplied.)

The sale of Route 68 was a very profitable transaction for Western, so much so, indeed, that former Chairman

Landis of the Civil Aeronautics Board found it necessary to dissent (R. 132-184) from the original order of approval on the sole ground that the purchase price for the route exceeded Western's investment by approximately $1,500,000. (R. 181-182.) Western's president stated that the transaction was a sound thing for Western, improved its financial condition, and was not a forced sale. (R. 26.)

Under these circumstances, and with a clear showing of adverse effect upon employees, we submit that this case is unquestionably an appropriate one for the imposition of conditions for the protection of employees, and that it would be completely inequitable to allow Western to reap the full benefits of this transaction without requiring at least a partial compensation of the employees to whose detriment the benefits were achieved.

B. The protective conditions imposed by the Board were fair and reasonable insofar as Western is concerned.

In our approach to the question of whether the particular conditions for the protection of employees imposed by the Board in this case are fair and reasonable, it is understandable that we should refer again to the railroad industry. We have previously pointed out that the same considerations of public interest in adequate, stable, and efficient transportation through preservation of employee welfare and morale are present in equal degree in the rail and air industries; that the authority of both the Board and the Interstate Commerce Commission to impose conditions for the protection of employees arises from almost identical statutory provisions; and that the intimate relationship between the employee problems of the air industry and those of the rail industry is further evidenced by the fact that Congress has seen fit to cover employer-employee relationships in both industries under the Railway Labor Act. For these reasons, it seems apparent to us that the nature of the

adverse effect on employees resulting from carrier acquisitions will generally be the same in both rail and air transportation. Accordingly, a formula of conditions which is well established and has stood the test of practical experience in the rail industry seems a logical and desirable one for utilization by the Board.

The conditions for the protection of employees imposed by the Board in this case (R. 843-847), as amended by the Board's final order in the proceedings below (R. 868-872), are taken in large measure from the so-called "Burlington" formula, which the Brotherhood asked the Board to adopt in this case. (See R. 797-803 for the proposed Burlington conditions.) The Board's conditions differ substantially from the Burlington conditions only in that they (1) provide a two-year instead of four-year "protective period" for Western's employees; (2) fail to provide any compensation for losses sustained as a result of forced sale of a home or cancellation of leases or land contracts of employees compelled to change their place of residence; and (3) fail to protect non-salary benefits attached to the previous employment, such as free transportation, pensions, hospitalization, relief, etc. These differences, of course, simply result in the Board's conditions being considerably less favorable to the employees, and more favorable to Western, than the Burlington conditions.

The Burlington formula derives its name from an abandonment case decided by the Interstate Commerce Commission (*Chicago, Burlington & Quincy Abandonment,* 257 I.C.C. 700) in which the Commission, exercising discretionary power under Section 1 (20) of the Interstate Commerce Act, provided terms and conditions for the protection of employees adversely affected by the abandonment substantially identical to those which it prescribes in consolidation cases under the mandatory provisions of Section 5 (2) (f) of the Interstate Commerce Act.

The formula of conditions provided in the "Burlington" case grew out of the Washington Agreement of 1936, sometimes referred to as the Washington Job Protection Agreement. This agreement resulted from conferences held between representatives of the Railway Labor Executives' Association, an association composed of the various standard railway labor organizations representing the great majority of railroad employees in the United States, and the American Association of Railroads, an organization composed of the presidents of approximately all class I railroads. These conferences were held for the purpose of negotiating a national agreement which would give to railroad employees specific protection in what are generally referred to as coordination cases subject to approval by the Interstate Commerce Commission.

The Washington Agreement was entered into in May, 1936. Its terms resulted from the knowledge and experience of practical transportation men from both labor and management and represented their best judgment as to a fair and workable basis of protection for employees adversely affected by consolidation transactions. The agreement was utilized by the Interstate Commerce Commission in *Chicago, Rock Island and Gulf Railway Trustees' Lease,* 230 I.C.C. 181, a case decided by the Commission under Section 5 (4) (b) of the Interstate Commerce Act, where its powers were identical in all respects to those vested in the Civil Aeronautics Board by Section 408 (b) of the Civil Aeronautics Act. The Commission's decision in this case was approved by the Supreme Court of the United States in *United States v. Lowden,* 308 U.S. 225, discussed in part I of this brief.

When the Transportation Act of 1940 was enacted, it contained in substance a provision which called for continued authority by the Commission to apply the terms of the Washington Agreement and also a further paragraph

requiring that no employee of a railroad affected by an order of the Commission providing for consolidation and unification shall be in a worse position with respect to his employment or compensation or conditions of work for a period of four years following the effective date of the order of the Interstate Commerce Commission approving the transaction, provided that no employee would be protected for a period of time exceeding his length of service with the railroad. (49 U.S.C., Sec. 5 (2) (f)).

Accordingly, after 1940 the Commission provided a formula of protection for employees which was based in major part on the terms of the Washington Agreement, but which differed from that agreement in two respects. First, the period of protection is for a maximum of four years instead of five. Second, in the case of separations or furloughs, the employee receives his full wage rate up to a maximum of four years instead of receiving 60% of his previous compensation. Although it is the mandatory provisions of Sections 5 (2) (f) of the Interstate Commerce Act which call for such a formula,[5] the Commission has applied the same formula in abandonment cases where its authority is discretionary. It was from such a decision that the "Burlington" formula emerged.[6] Today this formula is recognized as an established pattern for employee protection in abandonment cases. Since the Commission in imposing this formula is exercising the same discretionary authority to provide employee protective conditions as the Board possesses under Section 408 (b) of the Civil Aeronautics Act, we proposed its adoption by the Board in this proceeding.

We have pointed out that the employee protective conditions imposed by the Board are less stringent from West-

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[5]Oklahoma Railway Company Trustees' Abandonment, 257 I.C.C. 177.

[6]Chicago, Burlington & Quincy Railroad Abandonment, 257 I.C.C. 700, 704-706.

ern's point of view than those which have been recognized as fair and reasonable by both management and labor on most of the country's railroads, by the Interstate Commerce Commission, and by Congress, and which have been upheld by several decisions of the Supreme Court. In view of this history, and Western's failure to even argue the question of fairness or reasonableness of the conditions, little purpose would be served by a discussion of each separate provision of the Board's conditions.

Western's attitude throughout has been simply that no conditions at all should be imposed. It was unwilling, throughout the Board proceedings, even to attempt to analyze the Burlington formula (R. 683), much less to enter into negotiations with representatives of its employees on the question of a fair and reasonable formula for employee protection. (R. 709-710). It did not want to be "saddled by what we might call additional unemployment insurance" (R. 686) or "hamstrung by formulas" (R. 710). It apparently felt that its employees should necessarily be held to have assumed the possibility of displacement as "one of the risks in working for the airline industry", and should not be given "charity" in the form of employee protective conditions in these transactions. (R. 711.) Such a philosophy, while it may explain Western's uncompromising position in this case, in no way militates against the conclusion that in the light of the established national policy supporting employee protection in transactions of this sort, the particular conditions imposed by the Board in this case are entirely fair and reasonable insofar as Western is concerned.

1. Arbitration features of the conditions.

As has been done by the Interstate Commerce Commission in imposing protective conditions approved by the

Supreme Court, the Board in this case refrained from undertaking to pass upon each and every claim of adversely affected employees, leaving such matters to agreement of the parties or, in cases of disagreement, to arbitration. The Board definitely did not, however, as contended by Western at page 32 of its brief, delegate to arbitration its functions of fixing the conditions and determining whether they were just and reasonable. Instead it prescribed a complete formula for the determination of employee claims, leaving to arbitration, if necessary, only the purely ministerial function of applying the formula to the facts in each employee's case.

Such an arrangement is, of course, the only practicable method of handling claims of individual employees in cases of this sort. To require the Board to conduct formal hearings and receive evidence as to the effect of the route transfer on each individual employee, to enter findings as to all of the displacements, transfers, wage loses, transportation expenses, seniority rights and the manner of their exercise, earnings in outside employment, etc., for all of the individuals formerly employed on Route 68, and all of the employees displaced by the series of transfers precipitated by each of the Route 68 employees exercising his seniority displacement rights, would be to burden the Board with such a time-consuming mass of detail in cases of this sort as to render it completely incapable of fulfilling its statutory duties. Moreover, we cannot believe that Western, any more than the Board or the other parties to this proceeding, would wish to assume the great expense and effort of submitting such details to the Board by testimony and documentary evidence in formal hearings.

Aside from these considerations, however, we think it is clear that Western's fears of being bound by an "unconscionable arbitration award" are completely unjustified. As condition No. 12 of the employee protective conditions

embodied in its final order, as amended, the Board retained jurisdiction of the proceeding for purposes broad enough to include the review of any arbitration award. Thus, the Board stated:

> "12. The Board hereby retains jurisdiction of this proceeding for the purpose of modifying or clarifying any provision of this order and for the purpose of imposing from time to time such other or further terms and conditions as to the Board may seem just and reasonable." (R. 847.)

Moreover, if in such a situation as Western envisions the Board should refuse to review an arbitration award, such refusal of the Board would be as subject to review by this Court as any other action taken by it, under the following provision of Section 1006 of the Civil Aeronautics Act:

> "(a) Any order, *affirmative or negative,* issued by the Board under this Act . . . shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia . . ." (49 U.S.C., Sec. 646 (a); emphasis supplied.)

2. Failure to require United to contribute to the cost of protecting Western's employees.

It is of course of little interest to the employees adversely affected by this transaction whether the cost of compensating them under the protective conditions imposed by the Board is borne by Western, United or both. Therefore we refrain from presenting any argument on this point, and simply state as our position that we believe the matter of allocating the costs of protective conditions to be within the discretion of the Board on the facts of each particular case, and that we do not think there is anything in

the record to justify the conclusion that the Board abused its discretion in this case.

It should perhaps be mentioned that while Western has sought a decree of this Court requiring the complete elimination of employee protective conditions, such a decree would not be justified even if the Court did conclude that the Board had acted improperly in this matter of allocation of costs, or in the inclusion of the arbitration provisions discussed above. These points relate not to the question of whether *any* protective conditions should have been imposed, but rather to the question of whether the *particular* conditions adopted by the Board may be permitted to stand. A finding in favor of Western's contentions on either of these points would thus justify no more than a decree remanding the case to the Board for revision of the conditions imposed.

III. THE BOARD'S CONDUCT OF THE PROCEEDINGS BELOW WAS PROPER AND LAWFUL.

In our discussion up to this point we have shown (1) that the Board possessed authority to impose conditions for the protection of employees adversely affected by transactions of the sort here involved; (2) that this was an appropriate case for the exercise of that authority; and (3) that the conditions which the Board did impose were fair and reasonable and in the public interest. There remains for consideration only the contention of the petitioner that in spite of all this, the Board's action must be reversed and the conditions completely eliminated because (1) the conditions were imposed as the result of reconsideration of the case after the Board had originally approved the transaction and permitted its consummation, and (2) the Board's conduct of the proceedings on reconsideration was not speedy.

A. Reopening and reconsideration of the case with respect to the question of employee protection.

Insofar as is material to this section of our argument, the Civil Aeronautics Act provides:

> "Except as otherwise provided in this chapter, the Board is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper." (Sec. 1005 (d); 49 U.S.C., Sec. 645 (d).)

> "The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general and special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out such provisions and to exercise its powers and duties under this chapter." (Sec. 205 (a); 49 U.S.C., Sec. 425 (a).)

The Board, pursuant to this latter section, formulated and published its Rules of Practice which, as effective throughout the period in which this matter was pending before it, provided:

> "285.11 Petition for Rehearing, Reargument and Reconsideration.
>
> "(a) Parties. Any Party may petition for rehearing, reargument or reconsideration of any final order by the Board in a proceeding, or for further hearing before decision by the Board.
>
> * * * * *
>
> "(c) Such petition . . . must be filed within 30 days after service of the order sought to be vacated or modified. After the expiration of said 30 days, such a petition may be filed only by leave of the Board granted pursuant to formal application upon a showing of reasonable grounds for failure to file the petition within the prescribed 30 day period . . ."

The Board's original order, approving the route transfer without conditions for employee protection, was entered on August 25, 1947. Within 30 days after service of that order, the Air Line Pilots Association filed its petition for reconsideration on the question of employee protection, and the Airline Mechanics Division, U.A.W.-C.I.O., filed a petition for leave to intervene and a similar petition for reconsideration. Subsequently, on October 13, 1947, the Brotherhood filed its petition for reconsideration, showing as reasonable grounds for its failure to file within the 30-day period the fact that the Board's opinion and order of August 25, 1947, was never served upon it, and that it only received a copy from the Public Counsel on September 13, 1947. (R. 241.)

The Board's order of August 25th had provided for consummation of the entire transaction within 21 days of the date of that order, which would, of course, be prior to the period prescribed by the Board's rules for seeking reconsideration. In its brief, Western states that this provision "pushed" (Petitioner's brief, p. 31) it into consummating its contract with United, and categorizes the Board's supplemental order of September 11, 1947, effecting the formal changes in the certificates of Western and United necessary to permit consummation on the 21st day (September 15, 1947), as an "uncompromising mandate" (Petitioner's brief, p. 19). The fact is, of course, that the initial proceedings resulting in the Board's order of August 25, 1947, had been accelerated at Western's request. (R. 58-60.) Under its agreement with United, Western had to obtain Board approval of the transaction before September 1, 1947, or face the possible calling or commencement of interest obligations upon a $1,000,000 loan made to it by United in connection with the transaction. (R. 11-12.) Moreover, it was the contract between Western and United, and not any whim or caprice of the Board, which "pushed" Western into consummation prior to the expiration of the

period for reconsideration, the agreement expressly stating that "... the consummation of the transfer and assignment of the Certificate and other property shall take place on the 21st day following the issuance of such order of the Board." (R. 12.) Thus the Board's action, in conforming its order to the provisions of the agreement, was simply a matter of accommodation to Western.

Western's position with respect to the Board's right to reconsider ts original order of approval, after consummation of the transaction, amounts to a contention that although other parties to the Board proceedings had the right, under the Board's rules, to seek reconsideration of the original order within 30 days, or thereafter for good cause shown, such right could be obliterated by acceleration of the date of consummation of the transaction approved by the Board. And if this theory were to prevail, it would also follow that the right of such other parties to appeal to this Court could be effectively foreclosed in similar fashion; for whatever difficulties might be encountered by Western and United in undoing or modifying what had been done in consummation of the Board's original order would be no less in the case of an appeal than in the case of a reconsideration by the Board.

The fallacy of such a contention is readily apparent. And in a remarkably similar factual situation, arguments identical with those urged by Western were rejected in the case of *Falwell v. United States,* 69 F. Supp. 71 (affirmed *per curiam* 330 U.S. 807). The following statements from the court's opinion would be equally pertinent in the instant case:

> "The action of Division 4 was always, by the clear terms of the statute, subject to reconsideration by the full Commission, provided application was made therefor within the time prescribed by the rules of the Commission—which was done. . . . It is true that the order

> of Division 4 was definite in its terms of approval of the proposed transaction and in its directions to the plaintiffs. . . . But any action the plantiffs took toward carrying out the provisions of the order was, as they well knew, subject to what might happen if, as a result of reconsideration by the full Commission, the order was reversed or modified. . . ." (69 F. Supp., 74-75.)

Clearly, then, the mere fact that consummation of this transaction pursuant to the Board's original order antedated the filing of petitions for reconsideration, which were filed in accordance with the Board's rules, did not preclude the Board from reopening the proceedings for further consideration of the question of employee protection. The only question remaining to be considered is that of whether, in so doing, the Board was guilty of such an abuse of discretion as to require reversal of its order granting reconsideration, and the setting aside of its further orders issued as a result of reconsideration.

It might be said that this question has already been answered in the negative, since we have already pointed out that the facts developed on rehearing fully established the extensive adverse effect of this transaction on Western's employees, and completely justified the imposition of employee protective conditions.

Another short but equally decisive answer to the question of the propriety of the Board's action is that the petitions for reconsideration were based in part upon developments occurring subsequent to the Board's original order but before its consummation, and before expiration of the time for seeking reconsideration, which conclusively demonstrated the incorrectness of the findings upon which the Board's original order denying employee protection had been based. These developments, brought to the Board's attention by the petitions for reconsideration, consisted of Western's action in laying off numerous Route 68 employ-

ees shortly after the Board's original order. (R. 194-196; 222-223; 821.) In the face of this showing, it would have been an abuse of discretion for the Board to have denied reconsideration.

It is of course conceivable that in certain cases where the findings sought to be reconsidered were not so demonstrably erroneous, the difficulties and inconveniences that a party might be subjected to as a result of reconsideration of a transaction already consummated might weigh heavily as a factor in the Board's exercise of its discretion to deny reconsideration, even on petitions timely filed. But here the very error which so clearly justified reconsideration was also one into which the Board had been misled by reliance upon representations made by Western's officials.

In its brief Western argues that its witnesses only made "predictions", and not representations, as to the absence of adverse effect upon employees. But this was clearly not the purport of the testimony appearing in the record herein, nor did the Board so understand it.

In quoting the testimony of Mr. Drinkwater, its president, at pages 27-28 of its brief, Western conveniently stopped just short of the question and answer giving final color to the quoted testimony, i.e.:

> "Q. If you are unable to absorb any of the personnel who might be left jobless as the result of this sale, do you have any plans with respect to taking care of that personnel?
>
> "A. *Well, there won't be any.* The last question covers that. (R. 42-43.)"

And further along in his testimony, Mr. Drinkwater again unequivocally testified as to the absence of adverse effect upon employees, as follows:

"Q. With respect to any personnel that was dropped as a result of the route sale, you don't think the Board should put any restrictions on that, but you would accept them if any conditions were put in.

"A. Well, it depends on what they were, *but the question is entirely academic because there are not going to be any personnel dropped as the result of route sale.* There may be some dropped because they are incompetent, or we have too many folks, *but not any dropped because of the route sale.*" (R. 44.)

In the light of this testimony no resort to legal doctrines of estoppel is required. The Board clearly did not abuse its discretion by refusing to deny reconsideration on the basis of prior consummation of the transaction; for it was only because of these erroneous representations by Western that it had permitted the route transfer to be effected without protective conditions for employees. Whether or not any estoppel was present, there was certainly a proper balancing of the equities by the Board.

Finally, it should be pointed out that the picture painted by Western is, to say the least, distorted, when it tries to convey the impression that almost three years after initial approval of the transaction, when it had gotten itself into an inextricable position, and without "warning of the possible pendency of doom", it was shocked by the imposition of employee protective conditions.

The fact is, of course, that the issue of employee protection was introduced at the outset of the entire proceedings, and the Board's original order of approval was expressly conditioned upon its understanding that no adverse effect upon employees would result from the transaction. With this background, Western must have been aware that the lay-off notices sent to its Route 68 employ-

ees just prior to consummation of the transfer might be expected to precipitate a reconsideration. And although it cannot be maintained that Western's position had become inextricable within 9 days after the route transfer, when the first petition for reconsideration was filed, it took no steps to have the status quo restored pending disposition of this and subsequent petitions. Instead it elected to take its chances on being able to block imposition of any conditions for the protection of employees. Having failed in this endeavor, it cannot now be heard to complain that developments over a three-year period have made a rescission of its agreement with United impracticable.

B. Delay in processing after reopening.

As we have pointed out, this appeal is brought pursuant to Section 1006 of the Civil Aeronautics Act (49 U.S.C., Sec. 646; 52 Stat. 1024). Paragraph (e) of that Section reads as follows:

> "(e) The findings of fact by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

At no stage in the proceedings below did Western urge to the Board any objection based on delay in the proceedings on reconsideration, nor has it shown any reasonable grounds for failure to do so. For that reason alone, we submit that its present argument on this point merits no consideration by the Court.

Had Western wished to accelerate the proceedings below, and had the Board on request refused to do so, it would

Certificate of Service

I hereby certify that I have served the foregoing document upon counsel for all parties herein, and upon the attorneys for United Air Lines, Inc., the Air Line Pilots Association and the Airline Mechanics Division, by mailing three copies thereof to each on the 27th day of September, 1951.

CLARENCE M. MULHOLLAND